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No. 85-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOUIS B. HUGHES and
PHILIP T. EICHELBERGER, JR.,

Petitioners,

v.

HOUSTON NORTHWEST MEDICAL CENTER, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

By their Petition for Writ of Certiorari (the "Petition") petitioners have presented this question:

> **Whether the finding below that petitioners' appearance before an administrative agency constituted tortious interference with contract impermissibly infringed upon the Petition clause of the First Amendment.**

There was no such "finding below" by any court or jury. At the trial of this case evidence was admitted concerning the conduct of Mrs. Reba Eichelberger, the wife of Petitioner Philip T. Eichelberger, Jr., before an administrative agency. The evidence was relevant on several grounds. No "finding" regarding Mrs. Eichelberger was rendered at any level.

The petitioners before this Court never appeared before any administrative agency. It was the wife of Petitioner Philip T. Eichelberger, Jr., who appeared before the administrative agency.

In order to get to the substance of the issue petitioners seek to raise, some restatement of the question presented will be necessary.

LIST OF PARTIES

There are only three parties to the tortious interference judgment being complained of:

(i) Houston North Hospital Properties, a Texas general partnership, which recovered the judgment for tortious interference;

(ii) Louis B. Hughes; and

(iii) Philip T. Eichelberger, Jr.

The individuals listed as respondents in the List of Parties in the Petition are all interested in the matter because they are general partners in Houston North Hospital Properties. They are not, however, proper respondents before this Court.

Houston Northwest Medical Center, Inc. has no interest whatever in the tortious interference judgment. Houston Northwest Medical Center, Inc. prevailed on a counterclaim for attorneys' fees under article 5.14(F) of the Texas Business Corporation Act based on a finding that petitioners had brought their shareholders' derivative suit without reasonable cause.[1] That award is not the subject of the Petition. Houston Northwest Medical Center, Inc. is not a proper respondent before this Court.

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[1] See Appendix B to Petition, pp. 27a-28a.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In the early 1970's, petitioners Hughes and Eichelberger joined a Texas general partnership, respondent Houston North Hospital Properties. Because petitioners breached their duties as partners, they were involuntarily retired from the partnership in 1975. A long and bitter court battle ended with the decision in *Hughes* v. *Aycock*, 598 S.W.2d 370 (Tex.Civ.App. — Houston [14th Dist.] 1980, writ ref'd n.r.e.), affirming a judgment ousting petitioners as partners.

In mid-1982, the partnership announced that it had agreed to sell the hospital it owned. Immediately after the agreement to sell was announced but before a sale could be consummated, petitioners launched an unrestrained assault to block the sale. Specifically they did the following:

(1) they filed a baseless lawsuit;

(2) they filed groundless lis pendens notices on the hospital land and improvements; and

(3) they wrote threatening letters to the proposed purchaser of the hospital.

In addition to these things, petitioners conspired with the wife of one of them (Mrs. Reba Eichelberger) to have her appear ostensibly as an interested citizen before the Texas Health Facilities Commission. The Commission was considering a request by the prospective hospital purchaser for approval of a transfer of the Certificate of Need to operate the hospital. None of these respondents was a party to that administrative proceeding but any delay there naturally delayed consummation of the hospital sale.

It is, of course, easy to claim that your opponents' lawsuit is baseless but in this case it was proven six times over. The verdict speaks for itself. *See* Appendix B to Petition, pp. 14a-29a. This was a strike suit, plain and simple. As the state appellate court held, the evidence at trial "would entitle, if not compel, the jury to believe" that petitioners' suit was all wrong, even without regard to the four affirmative defenses which were also sustained by the jury's verdict. *See* Appendix A to Petition, p. 10a. As the lower court indicated, if petitioners had simply made "[a] reasonable inquiry" they would have seen that they had "no reasonable cause to bring" this suit. *Id.* at 10a.

The facts regarding the lis pendens are equally disturbing. An interlocutory appeal yielded the result that the respondents' ability to free the hospital from petitioners' lis pendens notices under TEX.REV.CIV.STAT.ANN. art. 6643a might depend entirely upon how much money petitioners were claiming as damages. *See Hughes* v. *Houston Northwest Medical Center, Inc.*, 647 S.W.2d 5 (Tex. App. — Houston [1st Dist.] 1980, no writ). Petitioners promptly increased their ad damnum to over $62,000,000.

The merits of the petitioners' suit were disproved at trial by the testimony of their own witnesses. Any disinterested review of

the record would yield the conclusion that this case was brought not in order to recover a judgment but in order to have a suit on file for purposes akin to blackmail.

The tortious interference counterclaim of respondent Houston North Hospital Properties was blessed with compelling merit. The trial court correctly instructed the jury that they could base a finding of tortious interference only upon action "done with the purpose of causing [Houston North Hospital Properties] damage or loss without justifiable cause . . . ." Because everything petitioners did was a sham, the jury returned a verdict for Houston North Hospital Properties for tortious interference.

Yet here we are, three years later, still waiting to enforce our judgment.

REASONS FOR DENYING THE WRIT

I.
PETITIONERS LACK STANDING TO RAISE THE QUESTION PRESENTED HERE

Only Reba Eichelberger appeared before the administrative agency in the purported exercise of a First Amendment right under the Petition Clause. Only Drs. Hughes and Eichelberger are petitioners before this Court. This is, then, a case of assertion of jus tertii.

Someone once said that this Court's general rule denying standing to litigants asserting the rights of third parties "seems honored only in the breach." Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 425 (1974). It should be honored in the observance here because it so distinctly applies and because no exception to the rule is applicable.

As summarized by this Court most recently, the law of standing honored by this Court includes "prudential considerations that limit the challenges courts are willing to hear." *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 104 S.Ct. 2839 (1984). A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

The issue in this case becomes one of whether an exception should be made in favor of petitioners.[2] Certainly none of the exceptions previously created fits the facts of this case. Even if we focus on first Amendment cases, we see that there is nothing preventing or "chilling" Mrs. Eichelberger's freedom to assert her own rights. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). The activity sought to be protected (objecting to an administrative transfer of a certificate to operate a hospital) is obviously not "at the heart" of Mrs. Eichelberger's relationship with the petitioners. *See Munson*, 104 S.Ct. at 2850.

Unless some new exception is to be created to fit the facts of this case, the general rule against assertion of jus tertii deprives petitioners of standing before this Court.

II.
THE JUDGMENT BELOW IS SUPPORTED BY AN ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION BECAUSE THE CONSTITUTIONAL QUESTION PRESENTED NOW WAS NOT RAISED BELOW

Petitioners' case has traveled from state District (trial) Court, to the state Court of Appeals where judgment was affirmed, to the Texas Supreme Court which considered the case in its decision to refuse petitioners' writ, with a finding of "no reversible error." According to the Texas Rules of Evidence and the Texas Rules of Civil Procedure, petitioners had at least three different opportunities to assert that the conduct of Mrs. Reba Eichelberger in appearing before an administrative agency was protected by petitioners' First Amendment rights. They were:

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[2] Respondents note that the Petition in this case invokes no exception to the general rule but merely declares: "Accordingly, the First Amendment right to petition the government is variously referenced to herein as *belonging* to both Mrs. Eichelberger and petitioners." (Emphasis added) Petition, p. 4, n. 1.

1. The opportunity to object to the introduction of evidence in the trial court on the ground of objection asserted herein, *viz*, the infringement of petitioners' First Amendment rights;[3]

2. The opportunity to object to the charge to be presented to the jury by specifying this complaint to that charge;[4]

3. The opportunity to present petitioners' First Amendment claims to the Court of Appeals under a "Point of Error" in their Brief.[5]

At none of these stages in the proceedings below did petitioners assert any First Amendment right. And, although such a complaint would probably have been considered waived by the Texas Supreme Court[6], petitioners never even mentioned the First Amendment in their Application for Writ of Error to that court.

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[3] Texas Rule of Evidence 103(a)(1) provides that: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." During the trial of this cause neither petitioners' nor Mrs. Eichelberger's First Amendment rights were asserted. (Statement of Facts, pp. 960-973).

[4] Texas Rule of Civil Procedure 274 provides that "A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection." Petitioners' objections to the tortious interference jury question had nothing to do with the ground of objection they now assert. (Statement of Facts, pp. 1412-1413).

[5] Texas Rule of Civil Procedure 418(d) requires that briefs contain "[a] statement of the points upon which the appeal is predicated .... Such points will be sufficient if they direct the attention of the court to the error relied upon." None of the Points of Error in petitioners' state Court of Appeals brief implicated any First Amendment claims. *See* Brief for Appellants in the Court of Appeals for the First Supreme Judicial District of Texas, pp. ix-xi "Statement of Points of Error."

[6] Texas Rule of Civil Procedure 469(e) requires that points raised in an application for writ of error in the Texas Supreme Court "... be assigned as error in the motion for rehearing in the Court of Appeals ...."

Texas procedural law clearly provides many avenues for the assertion and preservation of a claim of error. These petitioners followed none of them.

If Texas is to have confidence in the finality of the decisions of its appellate courts, its rules of civil procedure cannot be lightly disregarded. It is well established in Texas that a claim of error is either preserved in the court below or lost. *Austin Co.* v. *Vaughn Bldg. Corp.*, 643 S.W.2d 113, 116 (Tex. 1982); *Watson* v. *Glens Falls Insurance Co.*, 505 S.W.2d 793, 797-98 (Tex. 1974). There can be no error in the judgment of the Court of Appeals in Texas predicated on a point not preserved before that Court. *Watson* v. *Glens Falls Insurance Co., supra.*

At trial and at both appellate levels, petitioners failed to take advantage of the available mechanisms for the preservation of error on their First Amendment claim. Petitioners' waiver constitutes an adequate and independent state ground of decision in this case based on the legitimate interests of the State of Texas.

This Court has traditionally governed itself with the principles of comity and orderly administration of justice by refusing to review state court decisions based on nonfederal procedural grounds that provide adequate and independent support for the judgment, even in the presence of a substantial federal question. *See, e.g., Wolfe* v. *North Carolina*, 364 U.S. 177 (1960); *Michel* v. *Louisiana*, 350 U.S. 91 (1955); *Herndon* v. *Georgia*, 295 U.S. 441 (1935). Even in criminal cases where the life or liberty of the petitioner may be at stake, a failure to preserve error according to state rules results in waiver of the right to complain of that error. *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977).

This Court has recently applied the rule that if the admission of evidence is not objected to on a specific ground, that ground cannot be used as the basis for an appeal. *INS* v. *Lopez-Mendoza*, 104 S.Ct. 3479 (1984).

Petitioners nowhere explain their failure to properly raise a First Amendment claim while they proceeded through the Texas state court system. They have defaulted under each of the Texas Rules of Civil Procedure cited above and have thereby waived their right to challenge the judgment of the Texas courts.

III.
PETITIONERS HAVE DEMONSTRATED NO UNCONSTITUTIONAL INFRINGEMENT OF THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

A. The issue framed by the petitioners is not presented in this litigation.

Petitioners attempt to bring a question before the Court which is not presented by the litigation below. In fact, the Question Presented in the Petition assumes an erroneous interpretation of the judicial result and a subtly deceptive characterization of the facts.

There was no "finding below that petitioners' appearance before an administrative agency constituted tortious interference with contract." Instead, the jury found, on the basis of all the evidence admitted, "that Louis Hughes [and] Philip T. Eichelberger, Jr. tortiously interfered with the contractual relations of Houston North Hospital Properties with respect to the proposed purchaser of the hospital complex."[7]

There was evidence of an appearance before an administrative agency, the Texas Health Facilities Commission, but it was the appearance of neither of the petitioners. Reba Eichelberger's appearance before the agency was not the only evidence of petitioners' concerted effort to delay and prevent the sale of

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[7] Special Issue No. 19 and the jury's answer thereto is set out in footnote 2 of the Opinion of the Court of Appeals of Texas for the First Supreme Judicial District, *Hughes* v. *Houston Northwest Medical Center, Inc.*, 680 S.W.2d 838, 841 (Tex.App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.), reprinted as Appendix A to the Petition (pp. 6a-7a). The issue also appears in the court's charge, reprinted as Appendix B to the Petition (pp. 26a-27a).

respondents' valuable property. The legal and factual sufficiency of the evidence was challenged in the state appellate courts which, after close examination, concluded the evidence was sufficient to support the judgment.[8]

B. The First Amendment issue petitioners raise has recently been determined by this Court adversely to petitioners.

The evidence of Reba Eichelberger's performance before the Texas Health Facilities Commission supported, but was hardly the sole basis for, respondents' cause of action for tortious interference. Petitioners' argument that the affirmance of the judgment "was wholly inconsistent with petitioners' right to freely inform the government of their wishes" is ultimately an argument for absolute immunity. The limits of the First Amendment right to petition the government were addressed by this Court as recently as last term in *McDonald* v. *Smith*, 105 S.Ct. 2787 (1985). The unanimous Court was "not prepared to conclude . . . that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right." *Id.* at 2790. Similarly, there is nothing to suggest the Framers meant to insulate from liability those who would scheme to delay or prevent other parties' performance of a contract by needlessly invoking the administrative procedures of a governmental agency. Although petitioners would limit the implication of *McDonald* to defamation cases (*See* Petition, p. 8, n. 2), this Court made particular reference to the lack of absolute immunity in other contexts:

> Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of petitioning activity; but "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461

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[8] *See Hughes* v. *Houston Northwest Medical Center*, 680 S.W.2d 838, 842 (Tex.App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.), reprinted on p. 8a of the Petition.

U.S. 731, 743 (1983); accord, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

The Petition offers no arguments for reconsideration of this authority.

C. There is no conflict among the Courts of Appeals on any issue in this case.

Without attempting to show how petitioners might benefit from one of the allegedly conflicting descriptions of a sham, the Petition urges the granting of the writ to resolve a conflict among the Courts of Appeals by "defining the parameters of the sham exception." This case does not require any such resolution of judicial conflict to resolve the issues in the case.

In *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), cert. denied, 104 S.Ct. 234 (1983) a case cited by petitioners, the court noted that the *Noerr*[9] and *Pennington*[10] cases "themselves provide little definition of what a sham may be other than to indicate immunity for 'genuine efforts' or 'good faith' attempts to influence governmental bodies." 708 F.2d at 1155. The court found one of the more cogent definitions of sham proceedings in *Gainesville* v. *Florida Power & Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980):

> Without a doubt, the intention to harm a competitor is *not* sufficient to make litigation or administrative proceedings a sham. That anticompetitive motive is the very matter protected under *Noerr-Pennington*. Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the *result* of the litigation but by the simple fact of the *institution* of litigation.

Under this definition, or any other, the use of administrative procedure solely as a ploy to hinder a party in the performance of a contract is a sham.

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[9] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[10] *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); 488 F.Supp. at 1265-66 (emphasis in original); quoted at 708 F.2d at 1156.

D. The constitutional issue framed by petitioners does not affect the judgment in the case.

As the judgment below was not predicated upon any finding that Reba Eichelberger's activities constituted a tortious interference, the determination of the extent of her First Amendment rights is immaterial to the outcome of the case. The jury was charged to pass upon the conduct of the petitioners, not Mrs. Eichelberger. In its answer to Special Issue 19, the jury found petitioners' interference with the contractual relations of respondents without justifiable cause.

Even if Reba Eichelberger's activity was absolutely immune, the evidence of her activity was still admissible to show the purpose and character of the actions of petitioners. *United Mine Workers* v. *Pennington,* 381 U.S. at 670-71, n. 3; *Feminist Women's Health Center* v. *Mohammad,* 586 F.2d 539, 543, n. 7 (5th Cir. 1978); *Household Goods Carriers' Bureau* v. *Terrell,* 452 F.2d 152, 158, n. 18 (5th Cir. 1971). Before the intermediate Texas appellate court, these petitioners argued against the admissibility of this evidence on other grounds and lost. (*See* Petition, Appendix A, p. 9a). No issue raised before this Court would change the correctness of that ruling.

CONCLUSION

There is no good reason to further delay justice in this case. Respondents respectfully request that the Petition for Writ of Certiorari in this case be denied in all respects.

Respectfully submitted,

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